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# In the Supreme Court of the United States

OCTOBER TERM, 1956

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No. 938

PASQUALE MOCCIO, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the Court of Appeals (Pet. 28-37) has not yet been reported.

### JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1957 (R. 77). A petition for rehearing was denied on April 15, 1957 (R. 89). On April 18, 1957, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Harlan to and including April 25, 1957. The petition was filed on April 25, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supports the conclusion that petitioner was party to a conspiracy extending into the period of limitations.

2. Whether the trial judge's error in asking a question which assumed that the substance carried by the witness was narcotics was cured by his immediate instructions that the jurors were the sole judges of the facts.

3. Whether the trial judge erred in commenting on the credibility of an accomplice witness in his instructions.

4. Whether error occurred on *voir dire*.

5. Whether the prosecutor erred in using "rogue's gallery" pictures for identification only, where the pictures were kept from the sight of the jury, never admitted into evidence or described, and were necessary to establish identity.

STATEMENT

An indictment, filed May 16, 1955, in the United States District Court for the Southern District of New York, charged petitioner and nine other defendants with conspiracy to violate the narcotic laws (R. 10-14). Ten other co-conspirators, not defendants, were also named. Five of the defendants went to trial—petitioner, Reina, Valachi, Pagano, and Quartiero—and the jury found all five guilty as charged (R. 55, 57, 59, 61, 63). Petitioner was sentenced to five years imprisonment and a $10,000 fine (R. 59-60). On appeal, the Court of Appeals for the Second Circuit reversed as to

Valachi,[1] but affirmed as to the other defendants, including petitioner.

The evidence may be summarized as follows:

In April, 1951, Joseph Orsini was in custody at Ellis Island, awaiting deportation (Tr. 69). While there he met Pierre Lafitte, who was also in custody (Tr. 58). He took Lafitte into his confidence and invited him to take part in the business of illegally importing narcotics into the United States for sale—a business Orsini said, was then being carried on by Orsini and his partners both here and abroad (Tr. 71-76, 98-99). Lafitte contacted Agent Arthur G. Giuliani of the Narcotics Bureau, three days later (Tr. 70, 153). Soon thereafter, Lafitte was released from Ellis Island to participate in Orsini's business as a Government agent (Tr. 83, 153a). Through Orsini's girl friend, Marcelle Ansellem, Lafitte met Shillitani, Orsini's agent, and other members of the importing ring (Tr. 83-87).

The ring usually brought illegal drugs to this country by dispatching subordinates to France and Italy, who brought back with them, aboard ship, motor cars equipped with secret compartments to hide the drugs (Tr. 75-76). The subordinates would receive the drugs abroad from ring members (Tr. 100), who would identify themselves through a prearranged code (Tr. 121-122, 1681). The drugs were brought back in large quan-

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[1] Valachi sold narcotics to Pocoroba, a government agent, through Shillitani, a co-conspirator, on July 2, 1951. The Court of Appeals held that this evidence was consistent with the theory that the sale was not in execution of the over-all conspiracy charged, and that, since there was no other evidence that Valachi had joined in the larger plan, he was not chargeable with the two overt acts falling within the limitations period the court deemed applicable.

tities (Tr. 119) and turned over to the principals, who sold them as wholesalers through large distributors and peddlers (Tr. 104). All trip expenses were paid by the principals (Tr. 791, 795, 797, 1663). Some of the earlier and more important members of the ring, which was in operation by at least mid-1950 (Tr. 787), were Orsini, an admitted ringleader (Tr. 71-76); Giannini, who helped to arrange various trips in 1950, 1951 and 1952, and himself went to Montreal, Canada and Europe several times to further the ring's activities (Tr. 787, 1666, 1680-1681); Shillitani, Orsini's agent in the business, who figured in all of the ring's activities until his arrest and was a friend of Giannini (see *United States* v. *Shillitani*, 16 F.R.D. 336); Reina, who assisted in arranging trips in 1950 and went to Europe on ring business (Tr. 1665, 1679-1680); and Pagano.

Pagano first appears as an associate of Giannini in the spring of 1950, when the two went to the office of Charles Spar, a New York attorney, and sought Spar's assistance in obtaining a passport for Pagano (Tr. 742-748). Spar performed this same service for most of the other ring members and couriers, without knowing of their wrongful intentions (Tr. 664-665, 709, 739, 741-748, 790). Pagano went to Europe on April 12, 1951 (Gov. Ex. 36, 39M), and shared a hotel suite with Giannini in Milan, Italy (Gov. Ex. 51). Giannini had been in Europe for extended periods during 1950 and 1951 on narcotic ring business (Tr. 717, 731, 1667-1670; Gov. Exs. 38, 39K, 39L, 59).

By June, 1951, Lafitte was a trusted member of the group, and on the twenty-ninth of that month Shillitani showed him a letter from France saying that nearly four kilograms of heroin were ready for immediate

delivery (Tr. 106-107). Lafitte saw a second letter to similar effect on July 3, 1951 (Tr. 119, 598). Apparently in response to this, Pagano brought Pasquale Capasso to Spar's office on July 12, explained that they wanted a passport for Capasso, and indicated they were in a "hurry" (Tr. 745-750). Pagano witnessed Capasso's passport application, and Capasso left for Paris the next day, ostensibly for a "two weeks vacation". He returned eight days later (Tr. 1641; Gov. Ex. 37, 66, 67).

On July 24, 1951, Pagano, at a meeting arranged by Quartiero, offered George Salas, a ship steward, $2,000 to bring a package of drugs from Le Havre, France, to New York (Tr. 1011-1012, 1016). Salas agreed (Tr. 1013). Pagano flew to France the next day and met Salas in Le Havre when Salas' ship docked there (Tr. 1017-1018). Later that day, Pagano turned over to Salas a package weighing about ten pounds, cautioning him that he (Pagano) would be ruined if the package were lost (Tr. 1020-1021, 1024). Salas secreted the package aboard ship on the return voyage, arriving in New York on August 11, 1951 (Tr. 1024-1025). He was met by Quartiero, who asked if the "junk was okey" and received an affirmative answer (Tr. 1024-1025). Later that day, Salas and Quartiero went to a Manhattan bar where they met Pagano, petitioner Moccio, and an unidentified "big man" (Tr. 1026-1027, 1035, 1036). Pagano introduced Salas to petitioner, who then explained to Salas the procedure to be followed in getting the package ashore (Tr. 1027-1029). Salas was to return to the ship, wait until he was contacted by the "big man", and turn the package over to him. The "big man" would carry the package ashore,

and Salas would be paid that evening for his services. Everything proceeded according to the plan. That night, Salas went to the meeting place, a restaurant, to receive his share (Tr. 1029-1032). He found Pagano, petitioner, and Quartiero conversing in a booth (Tr. 1032). Salas took another booth. After about fifteen minutes, petitioner joined him and asked permission to settle with Salas through Quartiero. Salas agreed. Petitioner returned to Pagano and Quartiero, gave Quartiero a big roll of money, and then left the restaurant with Pagano (Tr. 1032-1033). As matters turned out, Quartiero gave Salas only $900, instead of the promised $2,000 (Tr. 1034-1035).

In November, 1950, defendant Reina contacted Mrs. Johanna Gruenseith and asked her if she would like to visit her parents in France, the expenses to be paid by Reina (Tr. 1662-1663). She agreed, made the trip, and was contacted in Paris by Giannini (Tr. 1665-1666). Mrs. Gruenseith, who knew Giannini, Shillitani, and Spirito (Tr. 1662-1665), was told to go to Milan, pick up a package from one "Alfredo" and bring it back to the United States for Giannini. This she tried to do, but "Alfredo" was unable to supply the package, so she returned empty-handed to the United States (Tr. 1667-1670). She made a second fruitless trip in January, 1951 (Tr. 1670-1672).

In May, 1952, Reina again asked Mrs. Gruenseith if she would like to see her parents in France, and she agreed (Tr. 1679-1680). Before leaving New York, Giannini asked her, in Reina's presence, to bring back to him a package which she was to receive from his brother-in-law in Salerno, Italy (Tr. 1680-1681). She was contacted in Salerno by Pellegrino, the

brother-in-law, amnd Rizzo, on June 7, 1952. They gave her four packagess containing heroin (Tr. 1684). She returned to New York with as much of this heroin on her person as shee could conceal and turned it over to Reina and Gianniini (Tr. 1686-1694).

On August 25, 1952, Agent Zirilli went to Pellegrino in Salerno, Italy and told Pellegrino that he was a friend of Giannirni's who was to take narcotics to the United States (Tr. 1729-1731, 1735, 1740). Pellegrino then turned over four kilograms of heroin to Zirilli, and was arrested as he did so (Tr. 1737).

ARGUMENT

1. On the issuee of the statute of limitations, we may assume that the overt act in which petitioner was shown personally to havve participated—the smuggling of narcotics by Salas in August 1951—falls outside the period of limitations.[2] However, two overt acts charged in the indictmentt and established by the evidence—the delivery of narcotics to Mrs. Gruenseith in June, 1952, and the delivery of narcotics to Zirilli in August, 1952

[2] It would seem that the six-year statute of limitations applicable to a conspiracy to evade taxes, established by 26 U.S.C. (1946 ed.) 3748, rather than the three-year statute fixed by that section generally, applies to a conspiracy to commit the offenses under the Internal Revenue Code, *i.e.*, sale of narcotics without order forms and not in the original stamped package. In *Braverman* v. *United States*, 317 U.S. 49, it was held that this statute is applicable to a conspiracy to evade federal taxes in the possession and transportation of distilled spirits without tax stamps. By the same token, it should apply to the sale of narcotics without meeting Treasury requirements. The Court of Appeals for the Eighth Circuit has held otherwise. *Wesson* v. *United States*, 164 F. 2d 50.

As to the importation of narcotics in violation of 21 U.S.C. 174, the period of limitations is that fixed by 18 U.S.C. 3282. That statute was amended by the Act of September 1, 1954, 68 Stat. 1145, to extend the period from three to five years, but not as to offenses already barred.

—are clearly within the statutory period. The issue, therefore, is whether the jury could properly find, as it was told it had to find (R. 23), that there was one general conspiracy of which these overt acts were in furtherance, and that petitioner was a member of that general conspiracy.

(a) The evidence amply supports the conclusion of the jury that there was one broad general conspiracy, continuing over an extended period of time, to import large quantities of narcotics of high quality into the United States and sell them here. The large number of overt acts which conformed to a single pattern justify the inference drawn by the jury that this was one massive conspiracy, directed by a central force, in furtherance of a common design. The attitude taken by those named as conspirators is also persuasive. They spoke and dealt with each other as partners, not as independents operating at arm's length.

It is true that there was some change in the active direction of the conspiracy after April, 1951, when Orsini was no longer able to participate actively. But it is also clear that this did not change the basic character or personnel of the conspiracy. Giannini, Reina and Pagano were active in the conspiracy before Orsini left and continued to remain active during the entire period covered by the indictment. They arranged passports for couriers. They obtained bonds and insurance for various automobiles used. They arranged transportation when it was necessary to do so. They saw to it that the couriers were met in Europe, that they received the narcotics, and that they were met again in New York, where delivery took place. The operations were carefully integrated and it is plain

that all participants acted pursuant to a common design to further a common end. Cf. *Blumenthal* v. *United States,* 332 U.S. 539, 557; *United States* v. *Rosenberg,* 195 F. 2d 583, 600 (C.A. 2), certiorari denied, 344 U.S. 838; *United States* v. *Morris,* 225 F. 2d 91, 92 (C.A. 7); *United States* v. *D'Ercole,* 225 F. 2d 611, 614 (C.A. 2).

(b) The overt acts with which we are primarily concerned—those in which petitioner directly participated and those performed in June and August, 1952—were in execution of the general conspiracy. The arrangements with Salas made by Pagano, after Shillitani had received word that narcotics were ready and after the trip hurriedly arranged for Capasos had apparently proved unsuccessful, were clearly part of the general pattern of importation. So, also, was Mrs. Gruenseith's trip in June, 1952. This last trip, like earlier ones of Mrs. Gruenseith, was arranged by a member of the central group. Her duties were explained to her by Giannini, a major figure in the conspiracy. She received the drugs in Salerno, Italy, from a person who claimed a marriage relationship with Giannini, and who obviously knew she was coming. The August, 1952, overt act involving Agent Zirilli followed the established pattern. He was accepted as having been dispatched by Giannini. The narcotics were brought to him by Pellegrino, Giannini's brother-in-law. The quality of the heroin was up to the usual standard. As the court below held (Pet. 34), the acts of June and August, 1952, show that the conspiracy here charged was one which continued well into the period of limitations.

(c) Petitioner was a party to the general conspiracy. He was the one who explained to Salas the method to be

used in bringing the package ashore, and it was he who paid Salas for his services. Petitioner and Salas met on two occasions, both times in the presence of Pagano and Quartiero, and petitioner left with Pagano after paying Salas and Quartiero.[3] Petitioner was close enough to Pagano, a principal figure, to be permitted to handle an extremely valuable shipment. The jury could well infer that petitioner must have been a party to the over-all conspiracy to be entrusted with so delicate and important a part in the proceedings. On the evidence, petitioner stands stamped as Pagano's confidant and trusted subordinate.

With petitioner thus closely identified with the central core of this large, continuing operation, the jury had the right to believe that he continued to remain a part thereof while the ring was in operation, as it unquestionably was during the period of limitations. *Hyde* v. *United States,* 225 U.S. 347, 369. Petitioner did not attempt to show that he had withdrawn from the conspiracy. Under these circumstances, the 1952 overt acts are chargeable against petitioner, even though he did not take part in them. *Pinkerton* v. *United States,* 328 U.S. 640, 646.

2. While the witness Salas was on the stand, the trial judge asked him two questions which assumed as a fact that the package transported by Salas contained nar-

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[3] Petitioner admits that Salas identified him at trial but contends no reasonable person could believe Salas, who had imported drugs on several other occasions and admittedly did not tell the truth at his own trial (Pet. 25). That was an issue of credibility for the jury to resolve. A conspiracy conviction may be sustained on the uncorroborated testimony of an accomplice. *Caminetti* v. *United States,* 242 U.S. 470, 495; *Newman* v. *United States,* 220 F. 2d 289, 290 (C.A. 5), certiorari denied, 350 U.S. 824; *United States* v. *Compagna,* 146 F. 2d 524, 526 (C.A. 2), certiorari denied, 324 U.S. 867.

cotics (Tr. 1143). Petitioner contends that this trenched on the jury's function and that the answers introduced incompetent opinion evidence as to the package contents, all to his prejudice.

The trial judge, however, is entitled to ask questions to aid in developing the facts, especially in a lengthy case such as this. *Glasser* v. *United States,* 315 U.S. 60, 82; *Simon* v. *United States,* 123 F. 2d 80, 83 (C.A. 4), certiorari denied, 314 U.S. 694. Perhaps, the questions were technically erroneous, as phrased; but, if so, the error was cured, for, when the matter was called to his attention, the judge forcefully instructed the jury that he had not intended to express any opinion as to the contents of the package, that the jurors were to disregard the underlying assumption, and that they were the sole judges of the contents of the package (Tr. 1147-1148). It must be presumed that the jurors followed this instruction. *Delli Paoli* v. *United States,* 352 U.S. 232, 242; *Opper* v. *United States,* 348 U.S. 84, 95.

3. During his charge, the trial judge informed the jury that "* * * an accomplice in the commission of a crime is a competent witness, * * *" whose testimony is often essential to the prosecution. He warned them that such testimony "* * * is to be received with caution and carefully scrutinized, * * *", but that, for his own part, "[i]f I were called upon to grade his [Salas'] credibility I would be disposed to give him a high mark" (R. 49). Petitioner urges that the trial court thereby led the jury to believe that it was bound by his comment, and that this comment destroyed the value of his charge that the jury was to receive accomplice testimony with caution.

Immediately after giving the questioned instruction, the trial court said (R. 49):

> While a judge in this court has the right to comment upon credibility, that doesn't mean that he has the right to encroach upon your sole and exclusive function of determining the credibility of witnesses. It is merely an expression of an opinion, not an attempt to usurp your function, and you are at complete liberty to disregard entirely the view I have expressed.

In the light of this instruction, the Court of Appeals below was clearly correct in saying (Pet., 36-37): "The judge was so plainly within his powers in commending Salas, that it is strange that the objection should be seriously urged." A federal judge may comment outright on any portion of the evidence, telling the jury how it struck him, provided that he also tells them that they are not bound by his expression of his own view. *Simmons* v. *United States,* 142 U.S. 148, 155; *United States* v. *Rosenberg,* 195 F. 2d 583, 594 (C.A. 2); *United States* v. *Aaron,* 190 F. 2d 144, 146-147 (C.A. 2), certiorari denied, *sub nom. Freidus* v. *United States,* 342 U.S. 827; *Bernal-Zazueta* v. *United States,* 225 F. 2d 60, 62 (C.A. 9). That is the case here.

4. On February 10 and 11, 1956, almost three weeks prior to the beginning of trial, Anthony Strollo and Vincent Mauro had been mentioned in New York newspapers as underworld figures involved in a police raid on a "bottle club" (Tr. 2320-2321). During the *voir dire*, the trial judge, at the request of the government, asked the following question:

> The Court: Does any member of the panel know any of the following named persons:

Anthony Stollo. (sic)
Tony Bender.
Vinny Mauro.
Vinny Bruno.
John Stapelli.
Charles Siegel or "Champ" Siegel, as he is sometimes known?

All of the jurors indicated they had not heard of these people (Tr. 2321).

On March 16, 1956, certain New York newspapers carried stories about the arrest, indictment, and arraignment of Strollo, Mauro, and Anthony Bender in connection with the above-mentioned raid (Tr. 2323-2324). Four days later, counsel for petitioner moved for a mistrial on the ground that petitioner was prejudiced by the earlier mention of these names (Tr. 2319). He now asserts that the refusal to grant this motion was error.

The government had information that the persons named during the *voir dire* were intimate friends of petitioner, Pagano and Valachi (Tr. 2324-2325). Bender and Mauro had been clients of petitioner's trial counsel (Tr. 2326). Therefore, it was proper to inquire as to whether any juror knew these persons. Petitioners' counsel at trial admitted that all of the jurors said they had not read the newspaper articles which appeared before trial (Tr. 2322). After it was ascertained that no juror knew anything about Strollo, Mauro, or Bender, they were not referred to again in the presence of the jury or connected to petitioner (Tr. 2319-2320). Therefore, the articles appearing before trial could not have prejudiced petitioner. See *Thiede* v. *Utah Territory*, 159 U.S. 510; *Spies* v. *Illinois*, 123 U.S.

131; and *Hopt* v. *Utah*, 120 U.S. 430. Even where jurors have seen adverse newspaper reports, they are not necessarily disqualified. The test is whether they can consider the evidence impartially. Obviously, if they have not seen the articles there can be no prejudice.

As to the March 16 articles, the trial court asked if petitioner's counsel wanted inquiries to be made to learn if the jurors had seen the articles or had been influenced by them (Tr. 2328-2329). Counsel for petitioner expressly declined the opportunity (Tr. 2329-2330). Under these circumstances, petitioner cannot claim error or prejudice. It cannot be assumed that the jurors read the newspaper accounts in question, *McHenry* v. *United States*, 276 Fed. 761, 764 (C.A. D.C.), much less that they were prejudiced thereby. *Cwach* v. *United States*, 212 F. 2d 520 (C.A. 8). The way was open for petitioner to raise his "* * * contention of bias from the realm of speculation to the realm of fact." *Dennis* v. *United States*, 339 U.S. 162, 168. He did not choose to do so and cannot complain now.

5. As mentioned, *supra*, p. 2, only five of the ten defendants named in the indictment were tried in this proceeding. Furthermore, there were ten co-conspirators named in the indictment who were not defendants. Many of these persons were known to the various government witnesses under aliases or nicknames only. Therefore, the prosecutor used eighteen "rogue's gallery" photographs to aid the witnesses in their identification of the persons with whom they had dealt.[4] The

[4] The pictures were of Orsini (Tr. 59); Marcelle Ansellem, Orsini's girl friend and a co-conspirator (Tr. 81-82); Geraldi, a man Orsini wanted Lafitte to meet (Tr. 84); Randazzo, a partner (Tr. 85); Shillitani, a co-conspirator (Tr. 87); Sansone, who was involved

photographs were marked for identification only, were not shown to the jury, were never put in their line of vision, and were always face down when placed on counsel's table (Tr. 906).

The pictures were relevant as aids in identifying various persons whose identity was material to the issues of the case. *United States* v. *Dubrin*, 93 F. 2d 499, 506 (C.A. 2), certiorari denied, 303 U.S. 646; *Cooper* v. *State*, 182 Ga. 42, 184 S.E. 716; and see *Wilson* v. *United States*, 162 U.S. 613, where the photograph of a homicide victim was held admissible to show identity. The photographs were carefully kept away from the jury. No error appears, for the photographs were restricted to their proper use and purpose.

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with Orsini, see *United States* v. *Sansone*, 231 F. 2d 887 (C.A. 2), (Tr. 137); D'Agostino, a friend of Sansone who sold narcotics to Shillitani (Tr. 126, 138); Spirito, a co-conspirator (Tr. 138); Martello, who dealt with Shillitani in narcotics (Tr. 111-114, 138); Giannini, a co-conspirator (Tr. 733); Capasso, for whom Pagano obtained a passport (Tr. 745-746, 751); Pellegrino, a co-conspirator (Tr. 755); Spirito's wife, who figured in overt act number 1 (Tr. 812); Giribone, a defendant who was not on trial (Tr. 812, 813); Siano, a co-conspirator (Tr. 913); Baldini, also known as Antoine Bergeret (Tr. 1329), and Ansaldi, defendants not on trial (Tr. 1159-1161); Pellegrino, also known as Joe Hardie, Giannini's brother-in-law and a co-conspirator (Tr. 1683, 1731); and Rizzo, a co-conspirator (Tr. 1731).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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